BRIEF

In Support of Petition for Certiorari.

I.

The judgment of the Supreme Court of Missouri was rendered June 23, 1941. It became final November 26, 1941, when the Court en Banc made its order denying petitioner's petition or application to it for its order upon Division No. 1, for transfer of the cause to the Court en Banc, for decision. This petition is filed within three months thereafter.

II.

JURISDICTION.

The jurisdiction of this Court is conferred by Section 237-b of the Judicial Code, 28 U. S. C. 344-b.

III.

STATEMENT.

A statement of the case has been made in the foregoing petition for writ of certiorari under the heading "A Summary Statement of the Matter Involved," which, in the interest of brevity, is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR and Supporting Authorities.

1.

The state court erred in rendering its decision and judgment in its effect of levying a tax and imposing a lien for it upon petitioner's lands by judicial action and in adjudging enforcement of the lien so imposed; the subject matter of taxation being committed exclusively to the legislative branch of its government by the State Constitution; and the Court, functioning judicially, being possessed of no authority over, or jurisdiction of the subject matter of exercising the power of taxation directly or indirectly.

State ex rel. v. Swaggerty, 203 Mo. 517, 102 S. W. 483;
State ex rel. v. Locker, 266 Mo. 384;
Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
16 C. J., pp. 393-394, Sec. 139;
Ball v. Rutland R. R. Co., 93 Fed. 513, 517;
Southern R. R. Co. v. Greene, 216 U. S. 400;
Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357;
Westmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

2-a.

The state court erred in giving to the decree of the Circuit Court, entered under Section 12509, R. S. Mo. 1939, in the respect that it included confirmation by the Court, functioning as an agency of the State Legislature, of the benefits assessed on respondent's plans for reclamation, the effect of operating as a final adjudication barring inquiry as to its own validity under the Federal Constitution; thereby holding and adjudging that, by its own

force, a completed act of the State Legislature bars judicial inquiry as to its validity or constitutionality.

W. J. McClanahan etc. Co. v. Stoffel, 41 Fed. (2nd) 651;
Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
16 C. J., pp. 393-394, Sec. 139.

2-b.

The Court erred in the respect that by its decision and judgment it extends and expands by judicial action, the limited taxing authority delegated by the State Legislature, through Chapter 79, Article VI, particularly Section 12532, and grounds the judgment upon an exercise of the authority so extended and expanded.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422;
State ex rel. v. Locker, 266 Mo. 348, 181 S. W. 1001;
Birmingham Drainage District v. C. B. & Q. R. R., 274 Mo. 140, 202 S. W. 404;
Bushnell et al. v. Mississippi etc. Drainage Dist., 230 Mo. 921, 111 S. W. (2nd) 946, 952;
Kansas City So. Ry. Co. v. Road Impv. Dist., 256 U. S. 658;
State ex rel. v. Patterson, 229 Mo. 373, 129 S. W. 999;
City of Kansas v. Hannibal & St. J. R. Co., 81 Mo. 285-293;
Keane v. Strodtman, 323 Mo. 161, 163, 18 S. W. (2d) 896, 898;
District v. Township, 317 Mo. 933, 297 S. W. 1.

2-c.

The state court erred in the respect that, by its decision and judgment, it determined the effect of exercise of limited delegated taxing powers by respondent through proceedings under the statute (section 12532) of general application by construing respondent's intention, as to the effect, from language employed by respondent in the pro-

ceeding and without reference to the legislative intent expressed through the statute; and by applying the effect, so construed, against petitioner; particularly since the intention of respondent, so construed, probably conflicts with the legislative intent and the effect so construed probably would render the statute unconstitutional, were it also the legislative intent.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422;
State v. Field, 17 Mo. 529;
Exchange v. Knott, 212 Mo. 616, 111 S. W. 565;
State ex rel. v. Locker, 266 Mo. 384, 181 S. W. 1001;
In re Sizer, 300 Mo. 369, 254 S. W. 82;
O'Brien v. Trust Co., 319 Mo. 1001, 5 S. W. (2d) 74;
Ex parte Striker (C. C. Ky.), 109 Fed. 145, 150;
Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 41;
Andrews v. Fidelity Mutual Life Ins. Co., 168 Mo. 151, 67 S. W. 582;
Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247;
Yick Wo v. Hopkins & Wo Lee v. Hopkins, 118 U. S. 356, 357.

2-d.

The state court erred in the respect that its decision and judgment, by its operative effect, revives and reinstates, on considerations of equity, respondent's original "plan for reclamation" and the old assessment of benefits on it, the improvement provided not having been undertaken and any rights under either of which having theretofore been abandoned and waived by respondent, and constitutes them, without proof, the basis for the tax levy and lien adjudged; and in the respect that the tax and lien, so adjudged, is applied on considerations of equities, not tried nor established, to secure funds to pay the cost of a different local improvement which was made under respondent's total "amended plan for reclamation," upon which amended plan and for which improvement an inde-

pendent total assessment of benefits had been made and confirmed, all under the statute.

Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115;
W. J. McClanahan etc. Co. v. Stoffel, 41 Fed. (2nd) 651;
Ballinger Oil Mill v. Southern Cotton Oil Co., 27 Fed. (2nd) 472;
Kansas City First Nat'l Bank v. White, 220 Mo. 717, 120 S. W. 36, 132 Am. S. R. 717, 16 Ann. Cases 889.

3-a.

The state court erred in failing and refusing to decide on their merits the federal questions involved.

State v. Humphries (Mo.), 119 S. W. (2nd) 401;
State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345; State ex rel. v. Robertson, 264 Mo. 661, 175 S. W. 610;
State ex rel. v. Trimble (Mo. Sup.), 18 S. W. (2d) 889;
Freeman on Judgments, Vol. II, Sec. 711, p. 1500.

3-b.

The state court erred in holding and adjudging that the fact that petitioner's precedessor in title was one of the signers of the petition on which respondent was incorporated effects an estoppel against judicial inquiry, at petitioner's instance, as to authority for or validity or constitutionality of the claimed effect of action taken, purportedly under the statute, and purportedly in exercise of the limited taxing power delegated through the statute.

O'Brien v. Wheelock, 184 U. S. 450;
State ex rel. St. Joseph Water Co. v. Eastin et al. (Mo. Sup. en Banc), 213 S. W. 57-59;

State ex rel. Blair v. Center Creek Mining Co., 262 Mo. 490, 501-502;
Boyd v. State of Alabama, 94 U. S. 645;
Freeman on Judgments, Vol. II, Sec. 711, p. 1500;
Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115.

4-a and b.

The Supreme Court of Missouri, both Division No. 1 and the Court en Banc, erred in refusing to transfer the cause to the Court en Banc, for decision; and erred in denying to petitioner the right given her by the State Constitution, Article VI, Amendment 1890, Section 4, to have the decision of the Court en Banc on the whole case. A decision by the Court en Banc is controlling over an opinion of division courts.

State v. Humphries (Mo.), 119 S. W. (2d) 401;
State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345.

5-a.

The state court erred in its decision and judgment in the respect that it sustains allowance by the State Circuit Court of an amendment, post trial and submission, of respondent's petition in a matter of substance and on statement of facts constitutive of its cause contradictory of the facts stated as constituting its cause on the petition on which issue was joined and tried; and in rendering judgment for respondent on the amended petition without issue joined or hearing or opportunity for either.

Belco v. State of Connecticut, 58 S. Ct. 149, 82 L. Ed. 288, affirming 122 Conn. 529, 191 Atl. 320, 113 A. L. R. 628;
Simon v. Craft, 182 U. S. 436, 21 S. Ct. 836, 45 L. Ed. 1165;

Railroad Commissioners of California v. Pac. Gas & Elec. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319;

And through a regular course of judicial proceedings, Ball v. Rutland R. Co. (C. C. Vt.), 93 Fed. 513-517.

The Fourteenth Amendment requires due process and equal protection in procedural as well as substantive law.

Ex parte Striker (C. C. Ky.), 109 Fed. 145, 150;

Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4;

Andrews v. Fidelity Mutual Life Ins. Co., 168 Mo. 151, 67 S. W. 582.

5-b.

The state court erred in rendering its decision and judgment in the respect that it affirmed the judgment of the State Circuit Court in allowing respondent to amend its petition, post trial and submission, the trial having resulted in a total failure of proof and in disproving, on the merits, the cause tried, so as to state and rely upon a different and contradictory substantive right purporting to cure the failure of proof, no element of waiver being present, and in rendering judgment on the petition as amended without issue joined, or hearing or opportunity for either.

Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705;

Creighton v. Railway Co., 229 Mo. 325, 66 S. W. (2nd) 980, certiorari denied 293 U. S. 558, 55 S. Ct. 70, 79 L. Ed. 659;

State ex rel. v. Webster Groves etc. District (Mo.), 37 S. W. (2nd) 905, 908;

Riggs v. Price, 277 Mo. 333, 210 S. W. 420;

Foege v. Woestendiek, 212 S. W. 411, 415;

Quigley v. King, 182 Mo. 196;
Scovill v. Glasner, 79 Mo. A. 449;
Purdy v. Pfaff, 104 Mo. A. 491, 78 S. W. 824;
City of St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6.

6-a.

In determining the federal questions involved which present issues of denial of equal protection of law, which must be determined from comparison of state statutes of general application with the construction or application of them, or the rule of law adopted and applied and with the operative scope of the statute, in the particular case, this Court makes its own construction of the general statute or law and of the alleged special construction and application for purposes of the comparison.

Atchison etc. Ry. Co. v. Mathews, 174 U. S. 100, 19 S. Ct. 609, 43 L. Ed. 909;
Yick Wo v. Hopkins, 118 U. S. 366, 6 S. Ct. 1064, 30 L. Ed. 220;
Quaker City Cab Co. v. Commonwealth of Pennsylvania, 227 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927;
Louisville Gas & Elec. Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770.

6-b.

The state court erred in its decision and judgment in the respect that it adopted and applied against petitioner a special procedural law or construction of the State Code of general procedure; and in the respect that the special law or construction so applied specially, to petitioner, conflicts with the State Code and law of general application, including the State Constitution; and in the respect that the said special construction and application applied to

respondent adopts and applies a judicial procedure, which, inherently, is repugnant to the Fourteenth Amendment.

Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705;
Creighton v. Ry. Co., 229 Mo. App. 325, 66 S. W. (2d) 980 (cert. denied 293 U. S. 558, 55 S. Ct. 70, 79 L. ed. 659).

7.

The state court erred in its decision and judgment in the respects that it imposed directly and by affirmation of the judgment of the State Circuit Court, the burden of an assessment of benefits against petitioner's lands and a purported tax levy based thereon and purported lien therefor, all based upon a proposed local improvement which did not include any provision for corresponding benefits to petitioner's lands.

V.

ARGUMENT.

(Numbering employed corresponds to numbering of "Questions Presented" in the foregoing Petition for Writ of Certiorari.)

The amount of the single annual levy, a lien for which is enforced by the judgment of the state court, is not large. Standing alone it might not justify invoking this Court's jurisdiction to review the judgment. However, the judgment purports to and may constitute a final adjudication of the underlying basis of the lien, that is, the continued validity of the old assessment of benefits and the existence and validity of a total tax levy against it as a basis for annual levies. On that basis a number of other annual levies have been made, several of which are in suit and held in abeyance pending final disposition of this cause; a still further number of annual levies of installment tax will be levied in the future, and the assessment will be employed relatively perpetually as the basis for and measure of annual levies of maintenance tax by respondent. So that, in the total and in fact, petitioner seeks review of a judgment involving directly and consequentially imposition of a burden on her lands in a large amount and which well may become wholly confiscatory of the lands.

I.

The Judgment of the State Supreme Court Purports to Revive, or to Impose in the First Instance, a Special Benefit Tax and Lien for It Upon Petitioner's Lands; the Court Having No Authority or Jurisdiction of the Subject Matter of Taxation, Is Void by Force of the State Constitution and Probably Is Repugnant to Both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

We are considering here a question arising, in the first instance, on the judgment of the State Supreme Court. However, it is closely related to and presents a particular phase of the basis of questions numbered 2, 6 and 7.

The State Constitution, Article III, makes the usual and fundamental three-way distribution of the powers of government and expressly prohibits to each of the three branches exercise of any power belonging to either of the other two.

The legislative branch possesses exclusively the power of taxation. The courts, being the judicial branch, have no authority or jurisdiction of the subject matter of taxation. Hence a tax judicially imposed or dependent upon judicial action for its imposition is not a valid tax. When a court, or a judge thereof, performs any lawful function with respect to exercise of the State's power of taxation, it or he is not functioning as a court or judge, but as an agency of the State Legislature, and the result is not a judgment but a legislative act.

> Rhodes v. Bell, 230 Mo. 138, 130 S. W. 465;
> 16 C. J., pp. 393-394, Sec. 139.

Article III of the State Constitution prohibits the courts to assume exercise of the power. The legislative branch cannot surrender the power to the courts. The State

Legislature can neither add to nor take from the courts the powers given them by the State Constitution.

State ex rel. v. Locker, 266 Mo. 384.

A court cannot, in one breath, attempt to exercise the taxing power directly and judicially and in the same breath assume jurisdiction of the subject matter of enforcing the tax and a lien for it. The two powers exercised when assumed to be exercised in the same proceeding by a single judgment involve but a single subject matter—the state's power of taxation. Since the Court has no authority or jurisdiction of the subject matter of imposing the tax, it cannot validate the result of its assumption to exercise the prohibited authority through including in its judgment an act, prima facie, judicial. The entire judgment falls for lack of jurisdiction of the subject matter of taxation.

The judgment having been entered in contravention of a prohibition of the State Constitution, it cannot be said to have been entered according to the course of judicial proceedings. It denies due process of law.

Ball v. Rutland R. R. Co. (C. C. Vt.), 93 Fed. 513-517.

Through inquiry on a slightly varied approach, the conclusion must be that the judgment denies equal protection of the State's law in that the Constitution of the State is a part, the supreme part, of its law under an express constitutional prohibition over which the Court cannot exercise any lawful authority or jurisdiction. Judicial taxation also inherently would be special to the particular case, and, being prohibited by the State Constitution (Article IV, Sec. 53), it is unlawful; application of the same law, or the same application of the law, could not be made or be made lawfully, in any other instance as to any other person.

Equal protection of the law cannot flow from such a source.

> Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247;
> Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357.

A judgment of a court rendered without jurisdiction of the subject matter denies due process of law within the prohibition of the Fourteenth Amendment.

> Westmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

A law which on its face is unequal in that it does not apply to all persons in the same situation.

> Southern R. R. Co. v. Greene, 216 U. S. 400, 39 S. Ct. 287, 55 L. Ed. 536, 17 Ann. Cases 1247,

or a law of equal application on its face, but which intentionally is given a special construction and application so as to produce an unequal result in the particular case,

> Yick Wo v. Hopkins and Wo Lee v. Hopkins, 118 U. S. 356, 357,

denies equal protection of the law within the prohibition of the Fourteenth Amendment.

Viewed as dependent upon an assumption of and attempted exercise of the taxing power by the Court functioning judicially, the judgment of the State Supreme Court is void under circumstances which probably render it also repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The federal question on that issue is one of substance since, if petitioner's position on it be sustained, and exclusive of every other question or consideration, a reversal of the judgment of the State court would result.

We will leave for further development in considering question numbered "6" the fact that the judgment was entered in the exercise by the Court of the taxing power.

II.

The Decision and Judgment of the State Supreme Court Expressly is Based Upon the Effect of Plenary Proceedings Had by Respondent Under Section 12532, Chapter 79, Article VII, R. S. Mo. 1939, Upon Prior Plenary Proceedings Had by It Under Sections 12502-12503 and 12505-12509, by Each of Which Proceedings Successively Respondent Had Adopted an Official and Total Plan for Reclamation on Each of Which Plans Successively Respondent Had Caused to Be Made and Approved a Total Assessment of Benefits and Under the Second in Time of Which the Planned Improvement Had Been Commenced and Completed. The Court Construed the Effect by Construing the Intention Thereto of Respondent From Items of Language Employed by Respondent in the Proceedings Had Under Section 12532, the Second Proceedings, and Without Reference to the Legislative Intent Expressed Through the Statute and Thereby Arrived at and Applied a Conclusion Contrary to That Stated by Respondent in its Petition on Which the Cause Was Tried, Contrary to the Legislative Intent Expressed Through the Statute, and Probably Inherently Repugnant to Both the State Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The question here considered also arises in the first instance on the decision of the State Supreme Court, though it is made controlling of that court's affirmance of the judgment of the State Circuit Court, and, therefore,

also, is involved directly in questions numbered "6" and "7."

Section 12532 is a taxing statute.

Prior to proceeding under section 12532 respondent had adopted under sections 12502 and 12503 an original "Plan for Reclamation" and had caused benefits to be assessed and confirmed on it under sections 12505 to 12509.

Respondent then desiring to amend or change its plan for its proposed local improvement, invoked the authority delegated by section 12532 and, proceeding in accordance with the section, adopted and secured to be approved by the Circuit Court an "Amended Plan for Reclamation" and caused to be assessed and confirmed benefits on it. The new plan was total and the new assessment on it was total. Neither was made supplementary of, referable to, or in any way dependent upon, the old. Total rights of way were condemned on the new plan. Thereafter the making of the improvement was commenced and completed under and in accordance with the amended plan. No improvement was made under the original plan.

If the new proceedings effected an abandonment of or superseded the old, then the judgment of the State Court is void since it enforces a lien for an assessment stated, but not tried, to be grounded exclusively on the old assessment to pay toward the cost of construction of the improvement made wholly under the new plan. We employ "abandonment" in a practical sense, under the particular circumstances, as expressing the idea of "becoming unavailable upon which to base claim of right or to accrue further rights."

Section 12532, so far as pertinent here, authorizes the levee district (respondent) to amend or change its plan for reclamation with approval of the Circuit Court and provides that, in case, benefits had been assessed on the

prior plan, then unless the Circuit Court in its decree approving the amendment or change of plan shall also find that the benefits will not be changed, benefits shall be assessed anew and all further proceedings had thereon as in the case of an assessment on an original plan. In the instant case in which the new plan adopted was total and the new assessment of benefits was total, the effect on the old plan and assessment is clear—the new has been substituted for the old and the old has ceased to have any operative effect. The legislative intent could not have been otherwise and have avoided the result of two total assessments for a single contemplated improvement, and the result of an assessment without reference to benefit that is an assessment of special benefits to accrue from one local improvement enforced to pay the cost of another. Those and other results of doubtful constitutionality would have flown naturally from the statute as written had it expressed a legislative intent to retain in effect the old assessment.

The state court construed the effect of the new proceedings to accomplish just that, plus that respondent might sue expressly to enforce a lien stated to have accrued wholly on either assessment and, failing in proof, have judgment without trial on a claim of lien stated to have accrued wholly on the other.

The criteria employed by the state court in construing the effect of the proceedings under section 12532 are of doubtful constitutionality, at least, equal to the court's conclusion upon them. The court construed the effect of the proceedings by construing the intention of respondent as to what the effect should be from items of language employed by respondent in the proceedings, and removed from their context, independently of and without consideration or reference to the legislative intent as expressed through the statute, and concluded that the new proceed-

ings did not effect an abandonment of or supersede the old because respondent had not intended them to work that result. The conclusion is directly contradictory of respondent's own statement in his petition on which trial was had, is in direct conflict with the legislative intent as expressed through the statute, and, as above pointed out, probably is inherently unconstitutional.

A statute means what the legislature intends it to mean as expressed through it.

Gantt v. Brown, 238 Mo. 560, 142 S. W. 422.

Statutes delegating exercise of taxing powers are construed strictly, since a liberal construction well might operate as a judicial delegation of legislative powers, or delegation of taxing power to the courts, an exercise of the power by the courts, or in unequal taxation, or as a delegation of legislative discretion as to what the law shall be.

State ex rel. v. Locker, 266 Mo. 384, 181 S. W. 1001.

If the effect of the proceeding under section 12532 can be made to depend upon the intention of the district proceeding under it in one case, it can be made so dependent in any case. The result would be a delegation to the district and the court construing its intention of a discretion to determine in each case the law for it, a special law in each case made by the district and the court.

The judgment of the state court is repugnant to both the due process and the equal protection clauses of the fourteenth amendment: It includes enactment by the court, functioning judicially, of a special taxing law applicable against petitioner only and in direct conflict with section 12532, the statute of general application, or makes a special construction and application of the statute against petitioner which is not and could not be applied against

another, and imposes, judicially, a tax and tax lien upon petitioner's lands unlawfully, without authority or jurisdiction of the subject matter of taxation, and, by judicial action, delegates the legislative discretion as to what the taxing law shall be, to the court itself in the particular case and exercises the power according to the intention of respondent and in a manner in conflict with the legislative intent expressed through the statute of general application in the circumstances.

III.

The Decision of the State Supreme Court in Its Effect That It Was Unnecessary to Consider on Their Merits the Federal Questions Involved, in View of Its Decisions That (1) Since Petitioner's Predecessor in Title Was One of the Signers of the Petition on Which Respondent Was Incorporated and Petitioner Thereby Is Estopped to Question the Constitutionality of Action Taken by Respondent in the Exercise of the Taxing Power Delegated to It, and (2) That the Legislative Action in Making the Assessment of Benefits Having Been Completed, It Operates to Bar Judicial Inquiry as to Its Own Constitutionality, Probably Is, as Also Is the Decision Basis for It, Repugnant to Both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

The question here presented also arises, in the first instance, on the decision of the State Supreme Court.

The petitioner's claim to benefit of guaranties of the federal constitution is not founded on any contention that respondent should not have been incorporated, or that it should not have executed the purposes for which it was incorporated.

The complaint, as directed to acts of respondent, is merely that respondent, as a corporation, proceeded in a

manner which, as against petitioner and her property, brought its corporate acts into conflict with the Federal Constitution.

The State Supreme Court's conclusion that one on whose petition a levee district is incorporated is estopped to deny the legality or constitutionality of the district's corporate acts would induce, with the same force, the conclusion that one who imposes any trust in another cannot be heard to complain of a breach by the trustee, since the complaining party has put it within the power of the trustee to commit the breach.

The special relation between the landowner petitioning for the incorporation of the district and the district when incorporated is correctly defined by this Court in

Shepherd v. Barron, 194 U. S. 565, 24 S. Ct. 737, 48 L. Ed. 1115,

to be that of parties to an implied contract with mutual contractual obligations and duties. The particularly relevant mutual aspect of the contractual relationship probably is that the district would not burden nor attempt to burden the particular landowner's property unlawfully, or in excess of the taxing authority delegated, or unequally, or except for corresponding benefit conferred, and that the landowner would not object to his lands becoming burdened within that undertaking. Reasoning from the premise of unilateral estoppel reasons, at least in the particular case, into unconscionable results in the name of conscience, produces conclusions inherently unconstitutional, such as that by operation of the applied estoppel on agency exercising taxing power by legislative delegation may exceed his authority and may with impunity disregard rights, as to the particular landowner, guaranteed to all citizens by the Constitution.

Under the contract relationship that couldn't result and

equal administration of the general taxing law would be retained. One may not contract away in advance his right to constitutional security.

W. J. McClanahan Sugar Refining & Molasses Co. v. Stoffel, 41 Fed. (2nd) 651;
Ballinger Oil Mill v. Southern Cotton Oil Co., 27 Fed. (2nd) 472;
Kansas City First Nat'l Bank v. White, 220 Mo. 717, 120 S. W. 36, 42, 132 Am. S. R. 612, 16 Ann. Cas. 889.

When respondent voluntarily proceeded under section 12532, it intended to effect the result of applying the intention of the Legislature to the proceedings.

The State Supreme Court's holding that the completed legislative act in making the assessment of benefits operates of its own force to bar judicial inquiry into its validity or constitutionality is a holding which, if accepted, would effectively render nugatory the Fourteenth Amendment. The amendment being directed against legislative action, benefit of it cannot be invoked in absence of legislative action upon which it can operate.

There can be no more direct action repugnant to the due process clause, particularly of the Fourteenth Amendment, than to deny the right to be heard on it, and an aggravated form of denial is to give to the legislative act charged to be repugnant the force of barring inquiry thereon.

IV.

The Refusals of the State Supreme Court, Both Division Court and Court in Banc, to Transfer the Cause to the Court in Banc, for Decision, Denied to Petitioner, Particularly, Benefit of a Regular Course of Judicial Review Accorded as of Right by the State Constitution (Article VI, Amendment 1890, Section 4).

The question considered here is also one arising in the first instance on the decision of the Supreme Court.

The Supreme Court en banc is the highest court in the State of Missouri having jurisdiction to decide a cause in which a federal question is involved. Article VI, Amendment 1890, Section 4, of the State Constitution, in terms plainly mandatory, provides that on application (not petition or motion) of the losing party, in a case decided in a division court the cause shall be transferred to the Court en banc when a federal question is involved for decision. We may concede that where the federal question is not substantial, or even where the decision on other grounds would prevail whatever might be the decision on the federal question, or even where the federal question was decided on its merits by the division court and the decision was right, there might be no substantial basis for complaint of prejudice by refusal to transfer the cause.

However, where the division court, as in this case, has refused to decide a federal question on the merits, and the question is a substantial one, a decision of which in accord with the losing party's contention on it would compel judgment for him whatever disposition might be made of other questions, then the refusal operates to deny him a hearing by the Court in banc to which hearing he has a constitutional right. The decisions of the Supreme Court en banc are of higher authority than are those of the division courts.

State v. Humphries (Mo.), 119 S. W. (2nd) 401.

The instant case presents the antithesis in principle of the record considered by this Court in

State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345,

in which the division court had decided the federal question on its merits and application to transfer the cause to the Court en banc had been denied. The decision by the division court was found to be right and the refusal of the transfer, therefore, not prejudicial.

It may be assumed that had this cause been transferred the full court would have made its decision to conform to the law and the Constitution of the United States, and have removed all occasion for recourse to this petition for writ of certiorari.

V.

The Decision of the State Court, in Its Effect That Respondent Having Stated in His Petition One Sequence of Constitutive Facts as His Cause of Action on Which Issue Was Joined and Trial Had, Resulting in Failure of Proof, Might After Trial Amend His Petition to State Another Sequence of Constitutive Facts as His Cause of Action and Have Judgment on the Latter Without Issue Joined or Trial, or Opportunity Afforded for Either, No Element of Waiver Being Present or Found, Since the Two Substantive Rights Claimed Were of the Same Character and Probably in the Same Amount, Constitutes a Denial of Due Process of Law by the Most Direct Possible Means.

The question considered here arises in the first instance on the judgment of the State Circuit Court and is carried into the judgment of the State Supreme Court. There is not much which could be added explanatory of the manner in which the question arises beyond the statement of the question itself.

If judgment lawfully might be entered on an amended petition under the circumstance, it just as lawfully might have been entered on the original petition at the time of filing and without issue joined or hearing.

The state court apparently has viewed the question of amending pleadings as one of substantive rather than of procedural law.

The allowance of amendments of pleadings has nothing to do with the truth or falsity of the statement of the pleading, nor with the existence or nonexistence of the right claimed, but deals only with the sufficience of statement of the supposed right.

The state court based its decision in this respect upon the State Civil Code. If the code authorized the patent departure from the cause tried to the cause adjudged, the code itself would be repugnant to the due process of law guaranteed by the Fourteenth Amendment. However, the decision is in conflict also with the State Code.

Under the State Code, the plaintiff's petition must make apparent the precise nature of the charge against the defendant.

> Sidway v. Motor Co., 163 Mo. 342, 63 S. W. 705.

And the pleader is bound conclusively by facts stated in his petition on which the cause is tried.

> Creighton v. Railway Co., 229 Mo. A. 325, 66 S. W. (2nd) 980, certiorari denied 293 U. S. 558, 55 S. Ct. 70, 79 L. Ed. 659.

And the pleader is estopped to and will not be heard to take a position inconsistent with his pleading on which a cause is tried.

> State ex rel. Boatmen's National Bank v. Webster Groves General Sewer District No. 1 (Mo.), 37 S. W. (2nd) 905, 908.

Judgments on issues not made on the pleadings on which the cause is tried are coram non judice and void.

Riggs v. Price, 277 Mo. 333, 210 S. W. 420;
Foege v. Woestendiek, 212 S. W. 411, 415.

Language must not be robbed of its plain and obvious meaning to unable its author to extricate himself from a position of embarassment.

Quigley v. King, 182 Mo. 196.

An amendment after trial can be made only to cure an immaterial variance, R. S. Mo. 1939, Section 731, and the proof required must not be essentially different.

Scovill v. Glasner, 79 Mo. A. 449.

The plaintiff may not amend back to an earlier abandoned petition.

Purdy v. Pfaff, 104 Mo. A. 331, 78 S. W. 824.

And the statute does not authorize an amendment by striking out an allegation relied upon as a basis of the action tried.

City of St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6.

The holdings of the Missouri courts accord with the concept of due process of law, but none of them are applied in the particular decision of the state court.

VI.

The Post-Trial Amendment of Respondents' Petition, Approved by the Decision of the State Court, on the Particular Facts and Circumstances Denies Due Process of Law.

The question here considered applies the principles controlling of number V with the facts and circumstances controlling of number II.

VII.

The Judgment and Decision of the State Court Enforces a Lien for a Special Benefit Tax Without Corresponding Benefit or Arbitrarily Made in an Unreasonably Excessive Amount, and Which Is Discriminatory and Confiscatory and Denies Petitioner Equal Protection of the State's Law.

The question considered here is one of fact in law to be resolved from the face of the plans in evidence (R. pp. 63-98). The answer depends upon the location of petitioner's land with reference to respondent's proposed improvement, and the Missouri River, the character of the land as a river-made island and the character of the river itself. The situation in which the lands were and continued to be is illustrated graphically by the plat following R. p. 98 (Plaintiff's Exhibit A).

Petitioner's lands are identified thereon as tracts "89, 90, 91, 92 and 93," and in the name of "The Point Prairie Hunting and Fishing Club" (petitioner's predecessor in title), and as "Bull Island." It will be noted that petitioner's lands lie within respondent's corporate boundaries, that the surface elevation is approximately the same as that of the shore lands enclosed within the levee and about opposite the east or lower end of the island. It will

be noted that respondent's Missouri River levee is located a considerable distance to the south of them and on the old high bank of the Missouri River. It will be noted also that there lies between the said levee and the lands in suit a broad expanse of low slough lands (identified as "unknown owners"), separating the lands on Bull Island for its full length along its south side from the higher land to the south on which the levee is built. It will be noted also that the lands enclosed within respondent's levee slope from both the south side and the north side of respondent District toward the center of the enclosed lands, and slope also toward the east, so that the enclosed lands in the extreme east end of the District are much lower than the enclosed land on the shore directly opposite Bull Island. As to the condition which must have existed, prior to the construction of the works provided for, the "plan for reclamation" does not provide for any change whatever for respondent's lands on Bull Island, but leaves them wholly exposed to flood waters from the Missouri River to the same extent as they then were. It will be noted that no drainage from the bluff lands to the south of the District could have affected the lands on Bull Island, since they would have had to cross the lower part of the shore lands in the middle of the District and there would have been caught and carried to the east below Bull Island; and if the waters could have surmounted that unsurmountable obstacle, they would still would have had to cross the slough between respondent's Missouri River levee and petitioner's Bull Island, and then have climbed onto Bull Island in order to affect it. It will be noted that "retards 1-8" provided for in the "amended plan" are far up the river from Bull Island and intended to protect the river bank there from wash and erosion. If the "retards" could have any effect on Bull Island, it would be to direct the river's flow, by straightening it, more

directly against the north shore of Bull Island and cause probable increased wash and erosion there. It will be noted that no provision whatever was made for the protection of Bull Island on its Missouri River side against bank wash or erosion. In short, under the provisions of the plan, petitioner's lands on Bull Island were left in exactly the same position as existed at the time the District was incorporated, except that they might be subjected to some additional burden of flood waters of Missouri River by its being confined in narrowed limits and be made to serve as part of a "floodway" for the security of plaintiff's Missouri River levee and the lands enclosed by it.

This Court and the several courts of appeals have established through a large number of decisions some prominent criteria by which it is to be determined whether or not a special tax for a local improvement in a particular case is repugnant to the equal protection or due process clauses of the fourteenth amendment:

Inquiry is not foreclosed by the state of the local law, but a law fair on its face may be so construed and applied by the state in any particular case as to produce an unconstitutional result.

> Myles Salt Co. v. Iberia Drainage District, 239 U. S. 479;
> Nashville, Chattanooga & St. L. R. R. v. Walters, 294 U. S. 405-415;
> Yick Wo v. Hopkins, and Wo Lee v. Hopkins, 118 U. S. 356-373;
> Virginia Coupon Cases, 114 U. S. 269 et seq.

The whole theory of local assessment is compensation by corresponding benefit:

> McCormack v. Patchin, 53 Mo. 33, 36, 14 Am. 440;
> 44 C. J., p. 481, Sec. 2806;
> 44 C. J., p. 483, Sec. 2808;

Williams v. Hillman (Okla.), 145 Pac. 1111, 1116;
Pomeroy v. Public Water Works Co., 55 Colo. 476-483;
Owensboro v. Sweeney, 129 Ky. 607, 111 S. W. 364, 130 A. St. Rep. 477, 18 L. R. A. 181;
36 C. J., p. 1021, Sec. 66;
Halifax Drainage Dist. v. State (Fla.), 185 So. 123, 130.

The benefit must equal the assessment substantially:

White v. Tacoma (C. C. Wash.), 109 Fed. 32-33.

It is substantial and not uncertain speculative benefits which are required:

Marshall v. Commrs. of Upper Cache Drainage Dist., 144 N. E. 321, 323.

A special tax must not be levied disproportionately:

Houck v. Little River Drainage Dist. (Mo.), 239 U. S. 254;
Gast Realty & Inv. Co. v. Schneider Granite Co., 340 U. S. 55, 58-59, 36 S. Ct. 400, 60 L. Ed. 523.

The assessment must not be levied primarily for the benefit of surrounding lands. Such an assessment is confiscatory:

Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 479;
Schaforth v. Buena Vista Co. (Iowa), 165 N. W. 341, 342;
Ogden Levee Dist. v. K. C. Sou. Ry. Co. (C. C. A. 8 C.), 39 Fed. (2d) .....

The benefits must be special and beyond and in excess of those accruing to the general public from the improvement:

Cleveland, C. & St. Ry. Co. v. Munford (Ind.), 197 N. E. 826, 833;
Schaforth v. Buena Vista Co. (Iowa), 165 N. W. 341, 342.

Some indirect benefit based on vague speculation or surmise is not enough.

Thomas v. Kansas City Sou. Ry. Co., 261 U. S. 481, 484.

Remote and intangible benefits are not sufficient.

Chi. & N. W. Ry. Co. v. Board of Supervisors (Iowa), 165 N. W. 390, 391.

The benefits must not be based upon conjecture or speculation, or on the basis of equality with property which clearly is benefited.

Board of Directors of Miller Levee Dist. v. Prairie Pipe Line Co. (C. C. A. 8 C.), 292 Fed. 474;
Duncan v. St. John Levee & Drainage Dist. (C. C. A. 8 C.), 69 Fed. (2d) 342-345.

The classification of property, or the basis of assessment, must be such as will tend to produce equality of result.

Norwood v. Baker, 172 U. S. 269, 279, 19 S. Ct. 187, 43 L. Ed. 523.

The assessment must be made strictly within the provisions of the statute authorizing it, and the legislative

agency has no power to tax in any manner, except as conferred by the statute.

Birmingham Drainage Dist. v. C. B. & Q. R. R. Co., 274 Mo. 140, 202 S. W. 404;

St. Louis v. Wenneker, 145 Mo. 230, 239, 249 (en banc);

Bushnell et al. v. Mississippi & Fox River Drainage Dist. et al., 233 Mo. A. 921, 111 S. W. (2d) 946, 952;

Kansas City Southern Ry. Co. v. Road Improvement Dist., 256 U. S., l. c. 661.

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